

## **MINUTES**

### **MONTANA SENATE 58th LEGISLATURE - REGULAR SESSION**

#### **JOINT SELECT COMMITTEE ON DISTRICTING AND APPORTIONMENT**

**Call to Order:** By **CHAIRMAN GREGORY D. BARKUS**, on January 20, 2003 at 4:00 P.M., in Room 303 Capitol.

#### **ROLL CALL**

**Members Present:**

Sen. Gregory D. Barkus, Chairman (R)  
Rep. Debby Barrett, Vice Chairman (R)  
Rep. Joey Jayne (D)  
Rep. Michael Lange (R)  
Sen. Gerald Pease (D)  
Sen. Fred Thomas (R)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Susan Fox, Legislative Branch  
Prudence Gildroy, Committee Secretary

**Please Note:** These are summary minutes. Testimony and discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing on Districting and Apportionment

**{Tape: 1; Side: A}**

The meeting was called to order by **CHAIRMAN GREGORY BARKUS** followed by introductions of committee members and members of the Commission **Dean Jellison, Kalispell; Joe Lamson, Helena; Sheila Rice, Great Falls.**

**CHAIRMAN BARKUS** advised that the purpose of the hearing was to receive the plan from the Districting and Apportionment Commission as mandated by the Constitution.

**Susan Fox, Legislative Services Division**, testified she had been staff person for the Commission for over ten years. She read

from written testimony. **EXHIBIT(jdh11a01)** She noted the plan used a plus or minus 5% population deviation which was within the 10% de minimus standard adopted by the U.S. Supreme Court and used in Montana in the last four rounds of redistricting.

**Commission Chairperson Janine Pease Pretty On Top, Lodge Grass,** outlined her credentials and explained the job of the Commission. Her professional background was in higher education. She noted the Commission was composed of members who were not current office-holders as required in the Constitution. She explained her interest in the elective process in the state of Montana and its impact on the American Indian people. She was chairman of the Democratic Central Committee from 1983-1988 and was lead plaintiff in the voting rights case *Windy Boy v. Big Horn County*. The plaintiffs prevailed and evidence showed that voting rights were being violated in Rosebud and Big Horn Counties. She felt the process was very important and the right to vote was precious. She advised she came from a family of war veterans. Her great uncles who served in the Spanish American War and World War I did not have the right to vote but still defended their country. She said her son has served five years in the US Navy. She said she took her right to vote seriously. The Commission had spent significant amounts of time visiting with Montana citizens and passed a resolution addressing the opportunity to participate in the political process for American Indian people. She advised that Montana had an obligation through its Constitution to be respectful of the contributions and participation of American Indian people, but in the past that had not been the case. In the current decennial census the Indian population grew. She said their perspective, cares and needs should be part of the deliberations of the legislature. The state of Montana has experienced dramatic shifts in population. The impact of those shifts were brought to the attention of the Commission by Montana citizens. The Commission did not try to seek comfort in the districts formed by the previous Commission but tried to come to terms with the changes and shifts in population and to protect the voting rights of all Montanans. She recognized the significance of Legislative decisions concerning employment, economic well being, the support of children, road construction, school operation, and college and university operation. Voters must have opportunities to make good choices when electing legislators. She cited the obligation to protect voting rights. American Indians in Montana are the leading minority group. Among kindergarden children 11% are American Indian. It is critical to have American Indian perspectives represented in both the House and the Senate in proportion to population. She argued that the Commission's plan accomplished that and also responded carefully and with concern to shifts in population. She submitted that the plan is worthy of serious consideration by the committee. The plan reflected

the opinions, ideas and concerns of elected officials. **{Tape: 1; Side: B}** She credited **Joe Lamson** and **Sheila Rice** for their work with the citizens of Montana and for drawing a plan designed to serve the interests of the state of Montana. She held that there were districts drawn where issues and candidates could be the leading concern of electors instead of whether the district was Democrat or Republican. She commended the plan to the committee and asked them to take it in the manner in which it was given-- with seriousness, respect and with the best interest of the State of Montana in mind.

**Commissioner Sheila Rice** advised she sat on the State Administration Committee in 1993 and felt at that time that American Indian people were under-represented in that redistricting plan. She said the ensuing case, *Old Person v. Conney/Brown*, was still in court. She felt the resolution adopted by the Commission was appropriate. Selected as Commissioners two years ago, the Commission held six preliminary meetings and 14 regional meetings. They looked at the geography, drew lines and listened. They changed their minds and redrew lines in response to testimony that was presented. She advised in today's hearing they would be doing the same thing. They would be looking for those changes that need to be made. She addressed the use of a 5% deviation in the population of a district claiming that it was not somehow wrong, illegal, or unconstitutional. She declared that, throughout the process, she had relied on the "red book" entitled *The Realist's Guide to Redistricting*. She quoted from the book, "A total population deviation of up to 10% is generally considered acceptable without any justification at all." She addressed the myth that somehow minority/majority districts disenfranchise white voters. She advised that there was no guarantee of election in minority/majority districts, but for the first time American Indians have the ability to elect the representative of their choice of whatever race. The third myth dealt with the definitions of "compact" and "contiguous". She said that "contiguous" simply means that all the parts of the district are connected and every one of the districts met the contiguous guidelines. "Compactness" is relative. Quoting the "red book" again she said, "So long as the district is not drawn for impermissible reasons a district may take any shape even a bizarre one." She reasoned that compactness also refers to population. In Montana some districts have a lot of area but few people. The people tend to be congregated along road corridors and these districts pass the compactness criteria. She claimed there was no rule or legal precedent that says all areas within one district must be accessible by road from any other area in the district. In rural Montana, it doesn't matter if you have to go into another district to get there. She disagreed with

arguments that it would be hard for people to run in the new districts. In addition to the American Indian being able to elect the representatives of their choice, there will be a great number of swing districts.

**Commissioner Mr. Dean Jellison**, presented a minority report. He claimed that the inclusion of the mandatory criteria of the 5% which was predicated as proper and legal was wrong, tainted and flawed. He noted that the US Supreme Court has had cases questioning the creation of congressional districts as well as state legislative districts. Those cases involved the equal protection provisions of the 14th amendment and interpretations of the Voting Rights Act. He outlined the requirements of the Montana Constitution regarding districting. He testified plan 100 and 200 were created by Susan Fox. Plan 300 was authored by the Democrat contingent of the Commission working from a computer program. He said the big problem was the use of the 5% deviation. The solution was to recognize that the law in Montana allows a much narrower deviation. *(Note: Much of Commissioner Jellison's testimony was inaudible during the hearing and on the tape.)* He advised that there was no basis for the Montana Supreme Court to permit a 5% deviation. He felt the Commission should start over and make an appropriate plan within two weeks to a month. He felt the concerns of the Indian population could be addressed within a new plan with a deviation of no more than 1%.

**Commissioner Joe Lamson** stated the argument presented by **Commissioner Jellison** had nothing to do with established case law or the Montana Constitution. The criteria adopted by the Commission was the same as the previous Commission with two exceptions. The current Commission also took *Reno v. Shaw* which had not been decided at the time of the previous Commission which said race could not be used as the predominant factor in districting. The Commission took away the criteria that districts be in compliance with current legislative districts because of the census. The previous Commission was dealing with a census change of about 12,275 (1.6%) which was a little more than a district and a half. The current Commission was dealing with a population increase of over 103,000 people. They did not think it would be honest to try to preserve existing legislative districts as a discretionary criteria when it was mathematically impossible to do so in most areas. The other reason for dropping that criteria was that Montana had voted to adopt term limits. They thought Montanans placed less importance on incumbency than in previous years. The notion of 5% versus 1% was a basically a house of cards, he held. The motion for the 5% deviation was made by **Commissioner Jack Rehburg** and unanimously adopted by the Commission. It was the same criteria that was adopted by the

1990 Commission and the 1980 Commission. The criteria was nothing new and had not been cooked up at Democratic Headquarters to try to sneak through. He said it was the criteria used in most of the states. Supreme Court decisions established the 5% to give states more discretion to recognize communities of interest. He addressed the assertion that there should be no concern over the impact of a 1% deviation on Indian majority districts. **{Tape: 2; Side: A}** He held that a violation of the Voting Rights Act was a big deal and that states that had been consistently in violation were subject to review in every legislative and congressional districting plan thereafter.

*(Note: there is a slight gap in the tape here)* In analyzing the Northern Cheyenne district he explained that to pick up 350 people in a sparsely populated area would necessitate moving out into Powder River County which would bring the Indian voting age population to unacceptable levels and trigger a Section II violation. It would also affect the concerns of Republicans in Powder River County including the concern of **Senator Keith Bales** being able to run again. When the voting rights of one group are denied it can have a strange and peculiar effect. He said most criticism concerned the large Indian Senate districts and asserted that most Senate districts were large. He reasoned that it might be possible to draw 6 Indian House districts but it was not possible to draw 3 Indian senate districts. The pending lawsuit concerns senate districts, he informed the committee. He further compared the deviation used by the Commission with other Commissions. The 1980 Commission used the plus or minus 5% standard; they put in a plan that had about 8 districts that were over 5%. The overall deviation range was about 10.94%. They did not have the technology to break up some of the census figures. The 1990 Commission had an overall deviation range of 9.96%. The overall deviation of the current plan was 9.85%. The plan generally favored by the Republican party which is close to Plan 200 has a deviation of 9.86%. The reason to use the 5% deviation is to protect communities of interest, he held. He offered to present the plan or take questions.

**CHAIRMAN BARKUS** advised that the plan had been presented.

**Commissioner Lamson** maintained the plan had not been presented. He felt key aspects should be explained because of considerable misunderstandings.

**CHAIRMAN BARKUS** held that **Ms. Fox** testified that the plan had been presented on January 6th.

**Commission Lamson** asserted that the hearing was to find out what the thinking was behind the districts. He felt it should be placed into the record.

**CHAIRMAN BARKUS** advised him to proceed.

**Commissioner Lamson** went on to explain the decision for the North Central area. They thought it in the best interest of the state to address the *Old Person* issue. The area covered the Blackfeet and the Salish-Kootenai district. He advised Montana's Indian people had lived in those areas dating back 9000 years. The Commission found that Marias Pass is the lowest pass in Montana. They also used Highway Department figures which showed that 32,000 people drove over that pass in January. They found substantial ties between the areas. He noted that the Kootenai-Salish district is about the same size or smaller than 11 existing House districts. For the first time Cutbank and Conrad would not be separated and Cascade County was not split up because areas around there had lost population. Across the high line, they found the same problem because that is one of the least densely populated areas in Montana. The Rocky Boy and the Fort Belknap District would have to be made larger due to population. Traditionally, it would have to move north. He addressed the narrowness of the Fort Peck district. That district was originally drawn by the 1990 Commission because they felt that was where the community of interest was and that was where people lived. The area had a loss of population and thus the districts got bigger. He explained the change in the Lewistown area and the three surrounding counties was due to population. There were still strong communities of interest involving agriculture, he claimed. South of there another district was lost due to population. In Powder River and Treasure County some changes were made on behalf of Republicans. He explained the plan in the Billings area. He said minority communities had spread out. Under the new plan they would have a significant chance to influence the election in five districts instead of three. In Carbon County, adjustments were made in the plan at the request of Republicans. In Gallatin County, plans 100 and 200 would have given the county 7 house seats and plan 300 gave them 8. He explained that placement of Big Sky in light of objections by Commissioner Rehburg. Whitehall was moved from Jefferson to Madison County due to population and resource based communities of interest. Lewis and Clark County got 6 seats compared to 5 in the Republican plan. He indicated that **Rep. Dave Lewis** testified that the change in his district was fine with him but he didn't like the plan in general. They tried to draw districts in Deer Lodge, Powell and Granite Counties that met the concerns of the counties. Granite and Powell counties wanted to be in the same Senate district. There was input from Republican legislators in those districts on how to draw the lines. Changes were made due to concerns by the Republican Clerk and Recorder. In Missoula, changes were made at the request of the Clerk and Recorder; the same was true in Flathead County. A

lot of people in Flathead County had objections to the district that connects with Browning. He thought it ironic that not one single person from Flathead County lives in the portion of the district that is in Flathead County. It does not affect residents there. He noted that the districts formed at the end of the process tended to be large due to geography and population. In Lincoln County the district was kept intact with the support of Republicans. He offered how communities of interest were figured in each district and how the criteria was met was all in the record in the form of motions. They took their work very seriously, knowing change was difficult and people would have a hard time understanding the changes.

**Questions from Committee Members and Responses:**

**SEN. GERALD PEASE** asked if input from communities were taken into account in the Commission's decisions.

**Commissioner Lamson** advised that prior to drawing the lines there were a zillion alternatives. He took many suggestions and phone calls. When changes could be made that met the criteria they were made based on that input. He assumed that the legislature would make recommendations and the Commission would adopt some of them.

**SEN. PEASE** asked if areas were comfortable when the Commission left an area.

**Commissioner Lamson** indicated that you can't please everyone when it comes to redistricting.

**SEN. PEASE** asked **Commission Chairwoman Pretty On Top** who appointed her and she indicated she was appointed by the Montana Supreme Court after Commission members were unable to come to a majority vote on any of the nominations.

**REPRESENTATIVE JOEY JAYNE** asked **Commissioner Jellison** about his concerns regarding equal protection rights under the 14th Amendment. She asked if he voted in the unanimous vote to adopt the mandatory and discretionary criteria. **Commissioner Jellison** indicated he was not a member of the Commission at that time. He said **Elaine Sliter** was on the Commission at that time. The cases that were cited from the federal court on voting rights had nothing to do with the Montana Constitution, he held.

**REPRESENTATIVE JAYNE** quoted **Commissioner Jellison's** answer to a question from *The Missoulian* regarding Indian majority districts being legal and reasonable. She asked if he still thought those

districts were legal and if they meet the criteria passed by the Commission.

**Commissioner Jellison** maintained the Indian majority districts were legal except for the (*inaudible*-**CHAIRMAN BARKUS** asked him to speak into the microphone at this time). He thought the Indian majority districts were legal with the exception of the (*inaudible*).

**REPRESENTATIVE JAYNE** asked **Commissioner Rice** about changes made by the Commission based on public testimony. {Tape: 2; Side: B}

**Commissioner Rice** indicated that all amendments that were made post hearing were based on hearing testimony.

**REPRESENTATIVE JAYNE** asked **Ms. Fox** where the 5% deviation came from. **Ms. Fox** advised that the book referred to by Commissioner Rice was published by the American Bar Association. The 5% deviation was based on Supreme Court cases.

**REPRESENTATIVE JAYNE** asked **Ms. Fox** if it was true that the courts had ruled that a 5% deviation was presumed to be constitutional under the 14th Amendment. **Ms. Fox** indicated that the cases were based on the U.S. Constitution and that there had not been a case based on the Montana Constitution. The U.S. Supreme Court allowed the 5%. **REPRESENTATIVE JAYNE** asked what the impact would have been to small communities had the Commission voted for a 1% deviation. **Ms. Fox** said she didn't know the exact effect as she had not done a 1% plan. Districts drawn using the plus or minus 5% would all change. The 5% was used to balance as many of the mandatory and discretionary criteria as possible. A different balancing act would need to be used with a plus or minus 1%.

**REPRESENTATIVE JAYNE** asked **Commissioner Lamson** if he had done any studies or research on the use of the 1% and how that would affect Indian majority districts. **Commissioner Lamson** indicated it would necessitate finding about 350 more people in the Northern Cheyenne district. That would be a voting rights suit issue. The Crow were also on the low end and the situation would be similar. Two Indian House Districts and one Indian Senate District just in this area would be in jeopardy.

**REP. MICHAEL LANGE** noted that **Commissioner Lamson** spoke about the importance of maintaining communities of interest in Indian majority districts but at another point said that minority voters in Billings House District 13 would "have a chance to influence additional districts". He felt that sounded hypocritical.



**Commissioner Lamson** saw no hypocrisy or legal problems at all. He advised there was a certain threshold that minority populations have to reach before districts are drawn to recognize those particular communities. Even though communities in Butte and Billings are significant, their numbers are not significant enough. In the 1980 plan, districts were drawn similar to the 2000 plan. Districts were running in an easterly/westerly way rather than north/south. It was found that when districts that ran too far from the north into the southern parts of the Billings community, minority citizens had a real difficulty in electing candidates of their choice. Now there were swing districts that could elect candidates of their choice of either party or in any race.

**REP. LANGE** asked **Ms. Fox** if any statewide plan had been laid out for consideration that had a 1% or 2% deviation in each district.

**Ms. Fox** indicated that no plan had been presented in public before the Commission. She did not present a plan and there had been no plan of that nature presented before the Commission. She couldn't be sure if one exists.

**REP. LANGE** asked **Commissioner Jellison** if a 1% plan would not only be fairer but possible and practical.

**Commissioner Jellison** noted there had not been a calculation demonstrating the 1%. He thought the 1% would pass muster with the courts. He felt it would be far more practical and fairer.

**REP. LANGE** asked if a plan using 1% deviation in population could probably address the concerns of the Indian majority districts and would in fact make more Montana voters feel they were getting a fair deal and could possibly get more Montanans involved in the political process.

**Commissioner Jellison** said that was absolutely correct. (*His further comments were inaudible*)

**REP. LANGE** commended the Commission for their work and effort.

**REP. DEBBY BARRETT** asked **Ms. Fox** about her preliminary visits to meet with county clerk and recorders, political party central committee representatives, area legislators, tribal leaders and interested persons. She asked if that was why 2 to 4 plans for each region were drawn--to address public comment.

**Ms. Fox** noted that was a pattern she followed in the 1990 round--presenting multiple options because people respond very

emotionally to maps. It was a way to show some of the different ways things could be drawn.

**REP. BARRETT** asked **Commissioner Lamson** if prior to starting the process if he also attended the preliminary visits to meet with county clerk and recorders, political party central committee representatives, area legislators, tribal leaders and interested persons.

**Commissioner Lamson** advised that he did not meet with as many people or as extensively as **Ms. Fox** did but did travel all around the state sitting down with different interest groups, party officials, elected officials, and clerks that he knew in particular areas. There was a lot of concern in the Northeastern area. The hearing there was very one-sided.

**REP. BARRETT** maintained he misunderstood her question. Her question was about preliminary meetings.

**Commissioner Lamson** answered in the affirmative.

**REP. BARRETT** asked about addressing the concerns of the public.

**Commissioner Lamson** replied that as **Ms. Fox** testified, there were endless possibilities for the different areas. He drew a plan he thought represented the interests of a broader section of Montanans. When talking to county officials, they will draw a map that looks like **MACO**. When talking to city people, there will be city and town maps there. It is very subjective. Their plan tried to meld those ideas and a lot of districts in the plan were very similar to those of **Ms. Fox**.

**REP. BARRETT** reiterated that her question was if he was able to address the concerns of the public. **Commissioner Lamson** answered yes.

**CHAIRMAN BARKUS** advised that in light of the hour, he would rather adjourn but with due respect to the legislators who were waiting to testify and also with respect to the Commissioners who traveled a great deal, he wanted to finish this round of questioning of the Commissioners and then reconvene the following afternoon. He hoped that would be enough time to complete the testimony of the legislators prior to the Governor's State of the State message.

**SENATOR FRED THOMAS** asked **Commissioner Lamson** if the plan brought forward met the Montana Constitutional requirements.

**Commissioner Lamson** answered yes. He held that the plan and the alternative plans met the criteria.

**SEN. THOMAS** asked what definition he used for the word "compact".

**Commissioner Lamson** reasoned that in court cases coming out of Montana, the courts had recognized there were real problems in the state because of low densities of population. Many districts are very large and they tried to balance those areas. One can drive many miles in Eastern Montana before there are enough people to make the 9022. What they tried to do was put districts where people actually were.

**SEN. THOMAS** said he understood but wanted an answer to the question of what definition was used for the word "compact".

**Commissioner Lamson** indicated they looked at the district and whether it met the visual test, and if it was where the actual people live within a particular area. Some areas would be more compact than others. He agreed that districts were large.

**SEN. THOMAS** again said he did not ask about the size but about the word "compact" that is in our Constitution. He wanted to know if the Commission established a definition they would follow for each of the district proposals for "compact".

**Commissioner Lamson** advised that they went by the advice received from their legal counsel, **John McMaster**, who said to use the usual tests. If 85% of people are in a particular part of a district it is considered "functionally compact".

**SEN. THOMAS** asked what definition the Commission used for the word "contiguous".

**Commissioner Lamson** said they used the definition that all the pieces in the district had to be touching.

**SEN. THOMAS** asked about the use of that definition of contiguous.

**Commissioner Lamson** said contiguous was the easiest criteria that they dealt with. A district is either contiguous or its not contiguous.

**SEN. THOMAS** asked if the definitions were adopted by a motion of the Commission.

**Commissioner Lamson** indicated that it was part of the criteria that **Commissioner Rehburg** moved and they adopted. They had no

trouble making districts contiguous--the easiest thing to do in re-districting.

**SEN. THOMAS** asked about the average deviation of the plan.

**Commissioner Lamson** believed it was 3.5%.

**SEN. THOMAS** asked **Susan Fox** if it was possible to draw a 1% deviation plan.

**Ms. Fox** said it should be technically possible to develop a plan that had a plus or minus 1% deviation but the extent to which it would impact all of the other criteria was unknown to her at this time. She said she could not say with any confidence that the Indian majority districts could be preserved.

**SEN. THOMAS** said he wanted to know if it was possible to draw a 1% plan that would be within the parameters of 1% high and 1% low.

**Ms. Fox** replied that technologically they should be able to do it.

**SEN. THOMAS** directed a comment to **Commissioner Jellison** noting the Commissioner's repeated statements that it was illegal to use the 10% deviation and asked him why.

**Commissioner Jellison** replied the Montana Constitution says that (*inaudible*). The United States Supreme Court (*inaudible*) as equal as possible. (*His further testimony was inaudible*)

**SEN. THOMAS** asked that since this was the first time that a very partisan plan had been drawn and presented to the legislature and given that the system was hijacked to bring forward that partisan plan, he asked **Commissioner Jellison** if a 1% plan could have been accomplished and if the Indian majority districts could remain generally intact as they were presented.

**Commissioner Jellison** answered yes.

**SEN. THOMAS** asked **Commissioner Lamson** if he believed that the 10% adopted by the Commission complied with the Constitutional requirement that the districts be as equal as possible and practical.

**Commissioner Lamson** testified that **Commissioner Jellison** was incorrect that the courts in Montana had not ruled on that very subject. In the book put out by the American Bar Association on page 11 it referenced "a district court in Montana thus upheld a

10.94% deviation because the state policies respect the present boundaries of preserving communities of interest." The court had ruled on a Montana case and not a federal case.

**SEN. THOMAS** asked, given the 10% deviation, why HD 69 had a negative 4.84% deviation. He cited the table on page 38.

**Commissioner Lamson** indicated HD 69 was the area on the westside of Helena.

**SEN. THOMAS** asked about the justification for such a huge negative deviation (4.84%).

**Commissioner Lamson** replied that in sitting down with the people of Helena in drawing that particular district they felt the district met communities of interest. The percentage was caused from the counties that were bumped up against. Some were under and some were over.

**SEN. THOMAS** said it was city districts that had deviations on the negative side and rural districts such as the Flathead had such wide variations on the top side close to the 5%.

**Commissioner Lamson** said he disagreed with **SEN. THOMAS'** definition of urban and rural. Some Helena districts advance all the way from the capital to the north hills. Communities of interest have moved out beyond city boundaries into greater suburban areas. Kalispell was a classical example of that.

**SEN. THOMAS** asked why suburban districts were so big and city districts were so little.

**{Tape: 3; Side: A}**

**SEN. THOMAS** advised that plans had been overturned that were .7% because the main drive of the plan was to create democrat districts.

**Commissioner Lamson** cited an independent analysis done by the *Great Falls Tribune* concluded that there were 40 solid Republican districts, 30 Democrat districts and 30 seats where anybody could win. He said he didn't think a ten seat advantage was unfair to the Republican party.

**SEN. THOMAS** advised they were not going to accept one reporter's analysis of the districts as a fair and impartial evaluation.

**Commission Chairwoman Pretty on Top** remarked on the discussion of the 1%. It was obvious to her that the quest for 1% was a veiled

effort to destroy the ability of the Commission to make the Indian majority districts. To look for 300 additional people in any one of those districts, you would have to go quite far. She thought it was important to distinguish impact. She felt it was a veiled effort to destroy that intent.

**SEN. THOMAS** advised that in no way was there any interest in a 1% plan taking away any Indian districts that had been developed. There was an issue further that had to do with contiguous and compact. The 1% had to do with the Constitution--that districts are to be as "equal as practicable" in population size. Ten percent was not even getting close.

**CHAIRMAN BARKUS** asked **Commission Chairwoman Pretty on Top** about the loss of the Indian majority on the Northern Cheyenne district if the 5% deviation was not used. The majority would be lost 57 to 47%. **Chairperson Pretty on Top** affirmed that was true. To find 300 more voters would not be possible in that area. She had lived in a district that had 47% Indian voters and it was a losing proposition.

**CHAIRMAN BARKUS** argued that it seemed to him if you don't have an Indian majority in a district, you don't have an Indian majority. He asked how do you create one--by applying the plus or minus 5%.

**Commission Chairwoman Pretty On Top** advised that the flexibility within that criteria of the plus or minus 5% allowed the Commission to create the districts. The use of 1% deviation would jeopardize that very seriously.

**CHAIRMAN BARKUS** noted that he read in the paper of a proposed change of enrollment criteria for the Confederated Salish-Kootenai Tribes from one-quarter to any amount Indian blood. He asked when the Native American population was established, what enrollment criteria was used.

**Commission Chairwoman Pretty On Top** advised that it was a self-identification process.

**CHAIRMAN BARKUS** inquired if the self-identification process was on the census form. She replied it was. **Chairman Barkus** noted his great-grandmother was half Indian; should he then identify himself as being Indian on the census form. **Commission Chairwoman Pretty On Top** said he could and he should.

**CHAIRMAN BARKUS** asked **Commissioner Lamson** to state for the record that he did not use the population deviation allowance of 5% for political gain.

**Commissioner Lamson** replied that the agenda of the Commission was to put together communities of interest. He mentioned that one of the major constituencies of the democratic party was poor people and Indian people. The undercount of those people was notorious in the 1990 census and even in the last census which was considerably better. It was kept in mind that census takers might not get everybody.

**CHAIRMAN BARKUS** said the question was whether the Democratic party used the 5% deviation opportunity for political gain.

**Commissioner Lamson** advised that what they tried to do was to draw a map that represented the people of Montana and those communities. If that ends up for political gain for one party or another, then he guessed you could say there was political gain involved. They put together a plan just as previous commissions had done. He said the difference between their plan and the other plan was they intended to create a plan that they believe more accurately represents the current makeup of Montana voters.

**CHAIRMAN BARKUS** asked **Commissioner Lamson** to tell the committee who "we" is.

**Commissioner Lamson** replied that in this case it was **Commissioner Rice** and himself. They were the ones who sat down with their staff person for endless hours after talking to people ahead of time.

**CHAIRMAN BARKUS** asked if he agreed the Democratic party paid for the plan, they had Democratic staffers working the plan and that he and **Commission Rice** represented the plan on the Commission.

**Commissioner Lamson** said he didn't know what was meant by "paid for the plan"--did they purchase a computer as the Republican Party should have done--did they hire a staff person to go out and gather information and talk with people and come forward with alternatives and plans as the Republican Party should have done. He maintained they engaged in the process and there was nothing to apologize for.

**CHAIRMAN BARKUS** said they did not want an apology but just wanted him to state for the record if the party used the 5% deviation for political gain.

**Commissioner Lamson** replied that they used the 5% deviation to recognize existing communities of interest in Montana and sought to give them voices.

**CHAIRMAN BARKUS** asked **Ms. Fox** if, in her experience, a political party had ever become actively involved; such as, in this instance with drafting a plan.

**Ms. Fox** advised she had started working for Legislative Services in 1992. In her experience in the 1990 round, both parties were actively involved. No entities submitted an outside plan and that was the difference between last time and this time.

**CHAIRMAN BARKUS** asked about the difference in the votes in the 1990 plan--the number of votes that were 5-0 in the 1990 plan versus the number of votes that were 3-2 in 2001.

**Ms. Fox** advised that in the 1990 round the chairwoman did not vote except to break a tie. In this Commission, all five Commissioners voted and the majority of the votes were split votes.

**CHAIRMAN BARKUS** advised there was a tribal leader that wanted to testify.

**REP. CAROL JUNEAU** contended that the hearing had been advertised as a public hearing and there were people that traveled to be here .

**CHAIRMAN BARKUS** said it was not a hearing for public comment.

**REP. JUNEAU** asked if there was no public comment at the hearing.

**CHAIRMAN BARKUS** replied they would accept public comment but probably the next day.

**REP. JUNEAU** felt that those who traveled should be allowed to testify.

**CHAIRMAN BARKUS** said that with due respect they would allow that if they had time.

**SEN. THOMAS** asked **Commissioner Lamson** about using undercount to help justify the deviation in the Democrat districts.

**Commissioner Lamson** said they considered it. Re-districting was an art where a lot a things were considered. Undercount does not just affect Indians, it has to do a lot with poverty--non-Indians as well as Indians, he held.

**SEN. THOMAS** asked if undercount was involved in the justification of low deviations.



**Commissioner Lamson** said it was considered just as they considered a lot of different things.

**SEN. THOMAS** asked if it was fair to say he was quoted in the paper as saying that was something he did.

**Commissioner Lamson** replied he was quoted in the paper saying it was something he considered.

**SEN. THOMAS** contended that the Constitution allowed them to use the federal population census. It didn't say they could become the census bureau and decide who was undercounted or not.

**Commissioner Lamson** replied that it was not used as a criteria. They considered many things that people testified about.

**REP. JAYNE** asked **Commissioner Lamson** who voted on the mandatory and discretionary criteria besides himself, **Ms. Rice, Ms. Pretty On Top, and Elaine Sliter.**

**Commissioner Lamson** replied the other person was **Commissioner Rehburg.**

**REP. JAYNE** asked if all five of them voted on the criteria and **Commissioner Lamson** said yes. **REP. JAYNE** noted that the definition of "compact" the Commission used in their mandatory criteria was that "the Commission will use a general appearance test regarding compactness and consider functional compactness in terms of travel, transportation, communication and geography." She asked if **Commissioner Lamson** used that as his guide as to what "compact" meant.

**Commissioner Lamson** said that was their criteria and was what they used.

**CHAIRMAN BARKUS** asked **Commissioner Lamson** about introductory comments of **Mr. McMaster** about the criteria and how it applied. He asked if the example used was "it may be functionally compact but if it has the Bob Marshall Wilderness running through it then actually it isn't."

**Commissioner Lamson** replied that actually **Mr. McMaster** didn't use that example--he talked about a broad visual thing. **Mr. McMaster** made that remark in the newspaper, he advised. What did apply were rulings out of the 9th Circuit. The Commission was going by current law.

**REP. JAYNE** asked if **John McMaster** recommended to the Commission a definition of "contiguous" and was the definition "all in one piece".

**Commissioner Lamson** said that was basically it--all in one piece. He added that never in the entire proceeding did **Mr. McMaster** ever come to them and say "that district has the Bob Marshall Wilderness in it and is going to have some real legal problems."

**CHAIRMAN BARKUS** asked about mandatory criteria #4 which said "race cannot be the predominant factor to which the traditional discretionary criteria are subordinated. (*Shaw v. Reno*)" He asked **Commissioner Lamson** how he could justify drawing two districts that geographically are 300 plus or minus miles apart--not very compact, and not be in violation of criteria #4.

**Commissioner Lamson** testified **CHAIRMAN BARKUS** had attended the hearing in Pablo but not the one in Browning. People in those districts had no trouble traveling within those districts. People who have raised objections to those districts almost unanimously don't live in those particular districts. Race was not the predominant consideration and was a relatively minor consideration there. He said that actually, Native Americans are not considered a racial group, they are considered a language group. They put together communities of interest and also weighed the voting rights act requirements. He maintained people could argue the other way--that 94 white districts were created. They were not making race a predominant factor in those districts--it was just one characteristic of those districts.

**CHAIRMAN BARKUS** advised he was at the Browning hearing and there was one person who had traveled from the Ronan area to testify at that hearing.

**Commissioner Lamson** replied that was why they had a hearing in Pablo and **CHAIRMAN BARKUS** said that was correct.

**REP. JONATHAN WINDY BOY** read from written testimony of **Bruce Sunchild, Vice-Chairman of the Chippewa Cree Tribe. EXHIBIT(jdh11a02)** He noted there had been testimony that the ties of the Blackfeet Nation to Chief Mountain go back 9000 years but the year 1925 was the year that American Indians were recognized as citizens of the United States. He felt that race had become an issue in the hearing. He mentioned that in the United States one had to be 1/4 Indian to be recognized.

**Ann Hagen-Buss**, representing herself, read from written testimony. **EXHIBIT(jdh11a03){Tape: 3; Side: B}**

**Denise Juneau**, representing herself, stated she was a law student at the University of Montana at Missoula. Previously an educator, she worked in Browning and North Dakota. She said she had gone to school in Massachusetts, New Mexico, and Montana--both Bozeman and Missoula. Everywhere she moved, she always voted. She has always been involved in the political process. She had just finished an Indian Law class at the University of Montana and learned that Indians had always had to fight for the most basic fundamental rights taken for granted by the rest of the citizens. First they had to prove they were humans and not the "savages" mentioned in the Declaration of Independence. They had to prove a vested interest in their own land in order to prevent the taking of all of it. She advised they were still proving mineral and water rights. They had to prove themselves in order to be educated in white educational systems. They had to prove their religions were valid. Indians had to fight for simple recognition and the fight to exercise these basic rights continues, including the fight for the basic right to vote--the right to vote for the candidates of their choice. She felt the plan was a move in the right direction to meet the guarantee of equal protection and should go forward.

**Stanley Juneau**, representing himself, spoke in favor of the plan. His relatives and many others picked up arms to protect America in WWI. When they returned they were not allowed to vote. He spoke of citizen participation in the political process. Two of his brothers served in Vietnam. Two of his cousins were decorated with the Purple Heart. They fought for America including the right to vote and the right to participate in the state legislature as Representatives and Senators and he fully endorsed the plan as presented.

**SENATOR THOMAS** offered that the Commissioners be invited back the next day.

**REP. JUNEAU** asked about the meeting time so they could invite people back.

**CHAIRMAN BARKUS** advised the committee would meet at 3 p.m.

**REP. JUNEAU** asked if the public would be allowed to testify.

**CHAIRMAN BARKUS** indicated it would just be for legislative testimony.

**ADJOURNMENT**

Adjournment: 6:00 P.M.

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SEN. GREGORY D. BARKUS, Chairman

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PRUDENCE GILDROY, Secretary

GB/PG

**EXHIBIT** (jdh11aad)